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March 2, 2009

Senator Arlen Specter  
United States Senate  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Senator Specter:

I am writing in response to your letter of February 25. I am sorry that you believe some of my answers to written questions to be inadequate. I wish to respond to your request for additional information as fully as possible while still meeting the obligations attendant to a nominee for the Solicitor General's office.

Let me first say how much I respect the Senate and its institutional role in the nominations process. As the members of a co-equal branch of government charged with the "advice and consent" function, you and your colleagues have a right and, indeed, a duty to seek necessary information about how a nominee will perform in her office. By the same token, each nominee has a responsibility to address senatorial inquiries as fully and candidly as possible. But some questions – and these questions will be different for different positions – cannot be answered consistently with the responsible performance of the job the nominee hopes to undertake. For that reason, some balance is appropriate, as I remarked to Senator Hatch at my nomination hearing and as you quoted approvingly in the introduction to your written questions.

I endeavored to strike that proper balance in responding to your and other senators' written questions. I answered in full every question relating to the Solicitor General's role and responsibilities, including how I would approach specific statutes and areas of law. I also answered in detail every question relating to my own professional career, including my relatively extensive writings and speeches. Finally, I answered many questions relating to general legal issues. In short, I did my best to provide you and the rest of the Committee with a good sense of who I am and of how I would approach the role of Solicitor General. The only matters I did not address substantively were my personal views (if any) regarding specific Supreme Court cases and constitutional doctrines. These personal views would play no role in my performance of the job, which is to represent the interests of the United States; and expressing them (whether as a nominee or, if I am confirmed, as Solicitor General) might undermine my and the Office's effectiveness in a variety of ways.

In answering these questions as I did, I was cognizant of the way other nominees to the position of Solicitor General have replied to inquiries from senators. For example, in answering a question about his views of the use of foreign law in legal analysis, Paul Clement wrote: "As Solicitor General, my role would be to advance the interests of the United States, and previous statements of my personal views might be used against the United States' interests, either to seek my recusal, to skew my consideration of what position the United States should take, or to impeach the arguments eventually advanced by the United States." Similarly, Seth Waxman stressed in responding to questions about his understanding of a statute that "[i]t is the established practice of the Solicitor General not to express views or take positions in advance of presentation of a concrete case" and prior to engaging in extensive consultation within and outside the office. The advice I received from former Solicitors General of both parties prior to my nomination hearing was consistent with what the transcripts of their hearings reveal: all stressed the need to be honest and forthcoming, but also the responsibility to protect the interests of the office and of the United States. In my hearing and in my responses to written questions, I believe I have provided at least as much information to the Committee as any recent nominee.

As you noted to me when we met, I have lived my professional life largely in the public eye. I have written and spoken widely, so the Committee had the opportunity to review many pages of my law review articles and many hours of my remarks. I tried to answer every question put to me at my hearing completely and forthrightly. I met with every member of the Committee who wished to do so in order to give all of you a more personal sense of the kind of person and lawyer I am. I submitted letters from numerous lawyers, who themselves hold views traversing the political and legal spectrum, indicating how I approach legal issues. And as noted above, I answered many written questions from you and other members of the Committee.

In all, I did my best to provide you and the other members of the Committee with a complete picture of who I am and how I would approach the role of Solicitor General, consistently with the responsibilities of that office and the interests of the client it serves. But I am certainly willing to do anything else I can to satisfy your concerns, including meeting with you again.

Thank you for your consideration of this letter.

Sincerely,

A handwritten signature in cursive script, reading "Elena Kagan".

Elena Kagan